FOR ARGUMENT

No. 75-354

Supreme Court, U. S.
FILED
SEP 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

THE FIRST BOSTON CORPORATION,
Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED WITH NOS. 75-353 AND 75-355

FIRST BOSTON'S REPLY BRIEF

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September 16, 1976

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FIRST BOSTON'S REPLY BRIEF

The Issues for Decision

Chris-Craft contends that the various petitioners, including First Boston, engaged in a sort of backroom conspiracy to deny it through "fraud" an otherwise inevitable victory in the contest for control of Piper. This was indeed Chris-Craft's contention at trial, but it was rejected by both courts below, and First Boston was held liable solely by reason of the nonpurposeful BAR omission from the Bangor Punta registration statement. Thus, Chris-Craft's presentation here is not based on the findings of fact that frame the legal issues for decision by this Court.

Both courts below rejected totally, as a factual matter, Chris-Craft's charges that First Boston was the sinister guiding force behind all the many wrongs claimed to have been done Chris-Craft. The District Court stated (A158-59):

> "On the basis of the record, the Court cannot find that [First Boston] committed, or engaged in any course of conduct which operated as fraud or deceit upon Chris-Craft or the public shareholders of Piper."
>
> * * *
>
> "First Boston, in its capacity as an investment banker, rendered a variety of professional services to Piper Aircraft Corporation, Bangor Punta and members of the Piper family. In each case, substantive decision making power rested with and was exercised by these clients and not First Boston."
>
> * * *
>
> "The record compels the conclusion that [First Boston] acted solely in the furtherance of what [it] believed in good faith to be the legitimate interests of [its] clients."

The Court of Appeals, although holding First Boston liable as an underwriter for the BAR omission, affirmed these findings (A55 n.25):

> "We agree with the district court that there is no merit to [Chris-Craft's] other claims against First Boston, essentially that it was the chief strategist for Piper and [Bangor Punta] in the control battle. The district court found, based on substantial evidence, that in its capacity as investment

> banker First Boston merely provided professional services to these companies. The business decisions that led to violations of the securities laws were initiated by these companies, not by First Boston in its role as investment banker. We are aware of no authority for holding First Boston liable in that capacity."

It is thus Chris-Craft, not First Boston, which seeks a "de novo trial" in this Court (see Chris-Craft Brief 5). Absent exceptional circumstances—and none exists or is even argued—the "concurrent findings" of the two courts below are not to be relitigated here. *E.g., United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

As the SEC recognizes in its brief *amicus curiae*, (SEC Brief 155-59 & n.365), the Court of Appeals held against First Boston only by concluding that it had not properly performed its special duty under § 11 of the 1933 Act as a statutory underwriter (A48-55). On this predicate, First Boston was rendered liable to Chris-Craft under § 14(e) of the 1934 Act. These legal conclusions and the means by which they were reached—not Chris-Craft's rejected claims of fraud and conspiracy—give rise to the important issues that the Court granted certiorari to review.

In discussing these issues, the SEC concludes that the judgment against First Boston as a § 11 underwriter must be vacated to the extent it awards damages in excess of § 11's prescribed maximum (SEC Brief 155-59 & n.365,

194). But that result is the very minimum required by construction of the securities laws as a coherent whole. A correct interpretation of § 14(e), in light of its legislative history and purpose and in light of the express limitations of § 11, requires complete reversal of the judgment of liability against First Boston: Chris-Craft has no right of action at all against First Boston as a § 11 underwriter ("standing"), and First Boston's conduct did not violate § 14(e) ("scienter").[1]

Further, Chris-Craft's simplistic pretense that causation was "a matter of mathematics" (Chris-Craft Brief 29, 79), among other deficiencies, ignores the basic question of whether the Court of Appeals was correct in *presuming* that, but for the BAR omission, not a single Piper shareholder would have accepted Bangor Punta's exchange offer (A60). The SEC avoids the issue in a different way: it endorses presumed causation for "liability" but not "damages," relying on *Mills* and *Rondeau*, and claims to take no position as to whether causation of "damages" has been established as a matter of fact (SEC Brief 145-48, 161-62).

The real causation question in this case is one of *injury* to Chris-Craft—not "liability" in the abstract. The *Mills* presumption simply has no application in determining whether Chris-Craft was in fact injured, and the District Court *found* that causation in fact was not proved (A144-47).

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[1]In the face of Chris-Craft's screed, it bears repetition that there was no finding or conclusion below that "fraud" in any sense was involved as to the BAR omission. Even the SEC, which continues generally to support Chris-Craft's position on liability, now implicitly acknowledges as much (*see* SEC Brief 155-59 & n. 365).

The judgment against First Boston is without factual or legal foundation, and is contrary to basic principles of civil law. It serves no manifest or conceivable congressional purpose, and can only injure the public interest in the proper functioning of capital markets. The wrong done First Boston is egregious.

I. Standing

Both Chris-Craft and the SEC go to great lengths to establish a proposition not at issue here: that judicial implication under § 14(e) of some private right of action —e.g., a damage action by a deceived public shareholder— is called for by legislative intent (Chris-Craft Brief 40-46; SEC Brief 74-78, 83-85). The issues for decision here are whether an action for *damages* by a *contestant for control* is created by § 14(e) under any circumstances and, if so, whether such an action lies against a 1933 Act underwriter on account of an alleged deficiency in a prospectus.

A. When Chris-Craft and the SEC finally approach the first of these issues, both rely on repetitive assertion, wholly unsupported by a single statement in the legislative history, that there was "unmistakable congressional intent to afford standing to all participants" in contested tender offers (Chris-Craft Brief 37).[2] They base this sweeping assertion primarily on the concern that was expressed by Congress that the *burden* of regulation imposed by the

[2] Every legislative reference cited by Chris-Craft and the SEC, when examined, either supports the contrary proposition or is irrelevant. For the convenience of the Court, First Boston has reproduced the legislative history of the Williams Act and lodged copies with the Clerk.

Williams Act "for the benefit of investors" should fall equally upon all parties to a control contest. *E.g.*, SENATE REPORT 3.

But equal allocation of the burdens and duties imposed by the Act was Congress' only concern as to contestants for control.[3] Congress showed no concern for protecting contestants, or for creating any rights in their favor—the rights which are corollary to the duties imposed upon contestants are the rights of the target company's shareholders. *E.g.*, SENATE REPORT 1, 2, 3, 4; *Senate Hearings* 178.[4] It is those shareholders, public investors, "for whose *especial* benefit" the Williams Act was passed. *See Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[5]

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[3] Senator Williams stated:

> "Every effort has been made to avoid tipping the balance of *regulatory burden* in favor of management or in favor of the offeror."

113 Cong. Rec. 854 (Jan. 18, 1967) (emphasis added). Likewise, in an article cited several times by Chris-Craft, SEC Chairman Cohen stated:

> "The opponents in an opposed takeover bid would be placed on an equal footing. Each would be subject to equivalent disclosure and anti-fraud regulations."

Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAWYER 149, 153 (1966); *see House Hearing* 17.

[4] SEC Chairman Cohen stated, at *Senate Hearings* 178:

> "[T]he principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. . . . The investor is lost somewhere in the shuffle. This is our concern and our only concern."

[5] Chris-Craft (Brief 55) seeks to pass off this Court's controlling decision in *Cort* by announcing that it approved *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); this is quite true but also quite meaningless, since *Borak* granted standing to the very corporate shareholders "for whose *especial* benefit" § 14(a) of the 1934 Act was enacted, just as *Cort* requires.

In its zeal to urge the contrary, the SEC presents the astounding argument that Congress intended the Williams Act wholly to displace state law governing the rights and liabilities of competitors among themselves and to create a new federal law occupying that field.[6] This argument proves too much, for had Congress intended such a drastic step it surely would have made its will unmistakably clear, and the legislative history contains not a single statement to that effect. *Cf.* § 28(a) of the 1934 Act.

Each case cited by Chris-Craft (Brief 46, 50-53) and the SEC (Brief 112-16, 122) in support of standing supports the contrary proposition—that the Williams Act was enacted to protect shareholders, not to bestow any rights on contestants.[7] None of the decisions under § 14(e), with

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[6] The SEC, in contrast to the court below (A30), correctly states that Chris-Craft as a disappointed competitor would have no cause of action at common law on account of the acts it complains of here (SEC Brief 44-47; *see also* First Boston Brief 25-26 n.9).

[7] *See, e. g., Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 58, 60:

> "The Congress expressly disclaimed an intention to provide a weapon for management . . . ."
>
> * * *
>
> "[T]he principal object of the Williams Act is to solve the dilemma of shareholders desiring to respond to a cash tender offer . . . ."

Sargent v. *Genesco, Inc.*, 492 F.2d 750, 769 (5th Cir. 1974):

> "The evil to be remedied [by the Williams Act] was inadequate disclosure to tendering security holders. Congress made it clear that the investor protection sought by 14(e) was disclosure to those who had to make the hold or sell decision."

H. K. Porter Co. v. *Nicholson File Co.*, 482 F.2d 421, 423-24 (1st Cir. 1973):

> "Little in the legislative history [of the Williams Act] suggests that Congress was motivated by concern for the plight of frustrated tender offerors or, for that matter, the incumbent management of the target."
>
> * * *
>
> "From the statutory scheme and the legislative history, it seems clear that the overriding purpose of § 14(e) is the protection of the investor."

the single and very limited exception of *H. K. Porter Co.* v. *Nicholson File Co.*, (see note 7, *supra*, and our main brief at 24, 29), has granted a contestant for control the right to sue for damages. Nor have any of the decisions under the allegedly analogous proxy rules (Chris-Craft Brief 40-41; SEC Brief 107-112) allowed such actions.[8]

To be sure, contestants for control have been permitted to sue under § 14(e) for corrective *injunctive* relief during the course of a contest, because such relief benefits the shareholders themselves and supplements the SEC's enforcement of statutory obligations for the shareholders' benefit.[9] In contrast, a damage action by a corporate contestant in no way benefits the public investors intended to be protected by the securities laws. This crucial distinction is said by Chris-Craft (Brief 58-59) and the SEC (Brief 139 n.342 § 3) to have been rejected in *Borak*,

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[8] The proxy analogy is far overdrawn. Though both can affect corporate control, proxies and tender offers have "obvious differences," *see Senate Hearings* 35; *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 945-46 (2d Cir. 1969), and the "closest analogy" to the Williams Act in prior law was the regulation of exchange offers, where only shareholder-purchasers could sue. *Senate Hearings* 138; *see* SENATE REPORT 2-3; *Senate Hearings* 201. The concern of the Williams Act, as with § 10(b), is primarily with a decision to buy or sell at a given price. *See Senate Hearings* 34-35; *see also id.* at 118, 126, 131, 140-41, 143. The concern of the proxy rules, on the other hand, is corporate suffrage—the right of the shareholder to cast an informed vote. *See TSC Industries* v. *Northway, Inc.*, 96 S. Ct. 2126 (1976); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *See also* page 11 & n.15, *infra*.

[9] Chris-Craft relies heavily on *GAF Corp.* v. *Milstein*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972), to support its claim for damages. The case is to the contrary:

> "We should not be wooden or rigid in granting the right to the issuer seeking equitable or prophylactic relief—*not monetary damages*—to take the necessary steps to effectuate the purposes of section 13(d) [of the Williams Act]."

453 F.2d at 720 n.22 (emphasis added). *See also Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d at 947; *Ronson Corp.* v. *Liquifin A.G.*, [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,369 at 95,248 & n.7 (D.N.J.), *aff'd*, 497 F.2d 394 (3d Cir. 1974).

but *Borak* dealt only with the relief to be afforded at the instance of, and for the direct benefit of, shareholders.[10]

B. First Boston's additional point that actions complaining of a 1933 Act registration statement should be limited to those expressly provided by Congress in §§ 11 and 12(2) of that act is answered neither by Chris-Craft nor by the SEC.

The SEC does acknowledge (Brief 155-56 & n.365) that § 11's limitation of damage liability should be given effect in its proposed actions on registration statements under § 14(e), but ignores the other important limitation prescribed by § 11—the restriction of any claim for damages to purchasers of the registered securities.[11] Nothing in the language or legislative history of § 14(e) indicates a congressional intent to repeal this limitation by implication in the case of registration statements that happen to pertain to exchange offers.[12]

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[10] Courts have recognized that the "primary contribution of the Williams Act to the antifraud arsenal" is to provide a shareholder standing "whether or not he has tendered his shares." *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); *see Senate Hearings* 35. Judge Friendly's language in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d at 940-41, as to the "bearing" § 14(e) "may have on the issue of standing" refers to the point made in *Smallwood*, not to recovery of damages by contestants for control.

[11] This restriction has been most strictly construed and applied, *Barnes* v. *Osofsky*, 373 F.2d 269 (2d Cir. 1967), and the SEC's failure to take account of it is surprising in view of this Court's recognition in *Blue Chip Stamps* that it "would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." 421 U.S. at 736.

[12] As noted in our main brief at pages 32-33, the Williams Act was intended to protect shareholders faced with cash tender offers. Congress recognized that exchange offers were already adequately covered by § 11, and they were included within the literal scope of § 14(e) only in order to regulate communications opposing them.

Moreover, § 14(e) says nothing about underwriters, and for purposes of liability on a registration statement an underwriter is solely a creature of § 11, which imposes specified obligations upon him for the benefit of a specified class *and no one else.*

The SEC, like the Court of Appeals, regards § 14(e) as having invisibly incorporated and extended the § 11 obligations of a § 11 underwriter to a new, undefined and apparently unlimited class (SEC Brief 156-57 n.365; *see* A55). As Judge Mansfield observed (A117), Congress "would be startled to find" that it, or more accurately the courts, had accomplished such a result.[13]

C. Finally, Chris-Craft complains that First Boston's "one-sided view" toward standing would create "jungle warfare." Rather, were losing contestants permitted to sue on the hypothetical deception of shareholders of another company, the result would be a jungle of speculative litigation. Congress certainly did not intend § 14(e) to give rise to such controversies in the abstract and they should not be permitted by judicial implication.

II. Scienter

A. Chris-Craft and the SEC argue in passing that scienter, i.e., an "intent to deceive, manipulate, or defraud," *see Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. at 1381,

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[13] Nor does *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951), which is relied upon by both Chris-Craft (Brief 103-04) and the SEC (Brief 152-54), support the extension of § 11 duties beyond § 11's bounds. *Fischman* did permit an action challenging a prospectus to be maintained under § 10(b) of the 1934 Act, but only upon a claim of *fraud*, not negligence in respect of a § 11 duty. Even that limited holding is without support in this Court's decisions. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. at 752 n.15. *See also* 6 L. Loss, Securities Regulation 3912 (Supp. 1969).

is not required for damage liability under § 14(e) by reason of its language and legislative history (Chris-Craft Brief 69-72) (SEC Brief 154-55 n.364).

The language of § 14(e) is virtually identical to that of Rule 10b-5, and the lower courts have unanimously found the 10b-5 scienter requirement equally applicable to § 14(e), as pointed out in our main brief at pages 34-35.

The references in the legislative history cited by Chris-Craft (Brief 70-71) and the SEC (Brief 154 n.354) do not suggest that intent to defraud is unnecessary for liability under § 14(e); rather, they are general discussions of the Williams Act *as a whole*, with its various affirmative notice, disclosure, and filing requirements (*e.g.*, §§ 13(d), 13(e), 14(d) of the 1934 Act) (*see* note 8, *supra*). All specific references to § 14(e) in the legislative history analogize it to Rule 10b-5 and characterize it as the "anti-fraud" or "fraudulent transactions" provision of the Williams Act.[14] Indeed, in the course of its argument, the SEC acknowledges that § 10(b) and anti-fraud precedents are the source of § 14(e).[15]

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[14] *E.g.*, SENATE REPORT 10; HOUSE REPORT 11; *Senate Hearings* 131, 140-41, 143. In the legislative history of the 1970 Amendments to the Williams Act, Congress and the SEC repeatedly described § 14(e) as proscribing "fraudulent activities." *E.g.*, S. REP. No. 91-1125, 91st Cong., 2d Sess. 2 (1970); H. REP. No. 91-1655, 91st Cong., 2d Sess. 2, 7 (1970); *Hearing on S. 336 and S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 8, 35, 116 (1970); 116 Cong. Rec. 29251 (Aug. 18, 1970). *Accord*, 6 L. Loss, SECURITIES REGULATION 3660-61 (Supp. 1969).

[15] SEC Brief 17, 64-65 & n.159, 154-55 n.364. At 154-55 n.364, the SEC states that "the relevant portion of Section 14(e) is substantially identical to Rule 14a-9," implying that § 14(e) was modeled on Rule 14a-9 under § 14(a) of the 1934 Act. In fact, § 14(e) is "substantially identical" to Rule 10b-5 and does not follow either § 14(a) or Rule 14a-9, which, as Judge Friendly pointed out in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 & n.17 (2d Cir. 1973), lack the "evil-sounding language" of §§ 10(b) and 14(e).

Further, the fact that the language of Rule 10b-5(2), pertaining to material misstatements and omissions, was incorporated into § 14(e) itself, rather than a subsidiary regulation, is of no significance (see First Boston Brief 35 n.16). Congress patterned § 14(e) on Rule 10b-5 with full knowledge that the courts had construed § 10(b) and Rule 10b-5 as "anti-fraud" provisions, and enacted § 14(e) as a "fraudulent transactions" provision. The question whether the language of Rule 10b-5(2) "viewed in isolation . . . could be read" to proscribe unintentional but wrongful conduct is, therefore, as irrelevant to this case as it was to *Ernst & Ernst* (*see* 96 S. Ct. at 1390).

B. In order to afford a grudging measure of recognition to Congress' express limitations of an underwriter's liability in § 11, the SEC proposes a bizarre dual culpability test of its own devising. The SEC would limit an underwriter's liability under § 14(e) to the maximum amount permitted by § 11 if only negligence were found, but provide unlimited liability if something more were proven (SEC Brief 152, 156-57 & n.365, 159). There are two basic errors inherent in this approach: (1) it proceeds on the wrong assumption that intent to defraud is not required for damage liability in any amount under § 14(e), and (2) it mistakenly attempts to incorporate the § 11 underwriter's duty into § 14(e), making § 11 meaningless as to registered exchange offers. *Fischman* v. *Raytheon Mfg. Co.*, relied upon by the SEC, did not adopt § 11 standards under § 10(b) and in fact required proof of fraud in such cases (*see* note 13, *supra*).

The significance of the SEC's discussion lies in its acknowledgment that the Court of Appeals was mistaken in holding First Boston to have been anything more than

negligent, even in terms of "its independent duty as an underwriter" (SEC Brief 156-57 & n.365). The SEC suggests a remand to the District Court to reconsider that question, but, aside from the basic error of viewing § 14(e) liability in terms of a § 11 duty, such a remand is unnecessary.

The District Court has already considered First Boston's conduct and has found, on the evidence, that First Boston acted "in good faith" and did not engage in "any course of conduct which operated as fraud or deceit upon Chris-Craft *or* the public shareholders of Piper." Indeed, the District Court said that "were the record to support" Chris-Craft's claims against the other defendants, "the Court would be hard put to find *any basis*" for imposing liability on First Boston. (A158; emphasis added). As to the tendering Piper shareholders, First Boston was an underwriter; hence, the District Court has already found First Boston free from culpability in terms of "its independent duty as an underwriter," as well as otherwise.[16]

C. Though the SEC in effect concedes that First Boston is not liable under the scienter standard established by *Ernst & Ernst*, Chris-Craft persists in its Alice-in-Wonderland portrayal of the BAR omission as an intentional "fraud" of "devastating impact" (Chris-Craft Brief 20, 22).

Chris-Craft would have evil intent *presumed* from a later finding of materiality. Its thesis is that if one prepar-

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[16] Chris-Craft's insinuation (Brief 75) that First Boston decided "to remain silent" about the BAR on grounds of a claimed "professional privilege" and by reason of a policy of "loyalty to clients" is false and without basis in the record or in any submission of counsel.

ing a complicated and lengthy prospectus knows something and does not include it, he *ipso facto* had an intent to deceive or defraud, or was guilty of "reckless disregard for the truth" (Chris-Craft Brief 64-69). This ignores the fact that reasonable men may and do differ, and does not accept the necessity for the exercise of *judgment* by those carrying out difficult professional tasks in a complex commercial society.

The District Court's findings of "good faith," based on a careful assessment of all the evidence by a highly experienced trial judge,[17] absolutely preclude a determination of culpability under *Ernst & Ernst*.[18]

Moreover, were it at all relevant to the issues before the Court, we would show at length that First Boston's conduct was free even of negligence. Merely by way of further summary of the BAR matter, which is discussed in our main brief at pages 9-11 and 38-40, we note that the BAR was never "overvalued" as Chris-Craft claims, nor was there a "loss" on the BAR undisclosed to the public.

Carrying values on balance sheets do not normally represent realizable market values for any fixed asset, and Bangor Punta's use of estimated 1965 market value as the book value of the BAR was a conservative accounting treatment as that amount was 40% below the historic cost basis (D4). There was no representation in the prospectus,

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[17] Judges Mansfield and Gurfein observed that, in Judge Mansfield's words, the District Court's findings as to the BAR were based on "extensive proof . . . including the testimony of key witnesses who were personally observed and whose credibility was appraised by Judge Pollack, whose experience in the field of securities litigation at least matches if not exceeds that of this panel" (A118, *see* A98).

[18] *See generally* Note, *Section 11 and Underwriter Liability: A Case of Statutory Misconstruction*, 7 RUTGERS-CAMDEN L.J. 741, 752-53 (1976).

explicit or implicit, that estimated *1965* market value was *1969* market value, and the BAR's steadily declining post-1965 earnings record was fully set forth in the prospectus.

Likewise, there was no "loss," even an accounting loss, on the BAR until it was later sold. At the time of the exchange offer, a sale was not "a reasonable probability" (D13) and the board had ordered a lengthy study of the question; alternate approaches that might have effectively realized an additional $9 million were then under consideration and continued to be strongly espoused by some members of the board for months thereafter, until three days before the actual sale (D6-12). Even upon the sale, the only "loss" was a book loss, not a cash loss. Thus, while the shareholders' book equity declined by 12%, the sale was recognized in the financial community as improving Bangor Punta's prospects, and its shares increased in market price.[19]

Finally, Chris-Craft's suggestion (Brief 20-21, 77) that First Boston was somehow derelict or deceptive vis-a-vis the Piper shareholders in its "appraisal" of the Bangor Punta offer is factually distorted and disingenuous. First Boston of course knew of the possibility that the BAR could be sold at a book loss; First Boston also knew of the BAR's current insignificance and potential detriment to Bangor Punta's earnings (as disclosed in the prospectus, EV 47). Further, First Boston knew that a sale, if it occurred, would improve Bangor Punta's earnings prospects, the principal factor in valuing a going concern. First Boston's judgment took all this into account

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[19] In sum, the effect of a possible sale of the BAR was not of such significance as to provide even persons prepared to act in bad faith a motive for concealment, assuming there was something to conceal. Likewise, in contemplation and actuality the sale was positive, or at least immaterial, to the value of Bangor Punta's securities.

and was vindicated promptly by the market itself (A140), again when the market rose following the BAR sale, and finally by the total lack of any complaint from any tendering shareholder.[20]

First Boston acted in good faith and breached no duty to anyone.

III. Causation

The SEC contends that the Court of Appeals properly applied its "*Mills-Ute* test" of presumed causation to establish "liability," but agrees that causation of "damages" cannot be so presumed and refuses to address whether damages in this case were proved (SEC Brief 145-48, 161-62 & n.370). It is unclear whether the SEC regards injury-in-fact as encompassed within "liability" or "damages," but it is injury-in-fact to Chris-Craft, not "liability" *in vacuo*, that gives rise to the basic causation issue in this case.[21]

Mills announced a rule of law equating violation by corporate fiduciaries of the disclosure requirements of the proxy rules with legal injury to shareholders and, hence, with liability in a private action *by such shareholders*. If *Mills* has any direct application outside the shareholder-proxy context, which is questionable, it provides absolutely no basis for erecting a legal presumption of injury

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[20] First Boston was, in reality, not an "appraiser" at all and rendered no opinion on value to the public shareholders of Piper; First Boston did render to the Piper family, as required by their contract with Bangor Punta, its opinion that the package Bangor Punta proposed to offer to Piper's public shareholders had a market value of $80 per Piper share.

[21] There is, of course, a question of damage causation raised by the compensation of Chris-Craft for market loss.

to one party by reason of an allegedly material omission in a statement made to someone else.[22]

Chris-Craft both relies on the Court of Appeals' erroneous presumption and asks this Court to find causation by factual inferences (Chris-Craft Brief 82). The District Court, which considered and made findings on causation as a factual matter, found that the evidence did not justify any such inference (A145-46). Those findings are clearly correct and were unquestioned by the Court of Appeals, which felt compelled by its "*Mills-Ute* test" to *presume* injury (A59-60).

Since injury, *i.e.*, compensable loss proximately caused by the defendant, is an essential element in establishing liability in a civil action for money damages and was not proved by Chris-Craft, reversal is required on this ground alone.

IV. Relief

We note only the following as to relief, which is fully discussed at pages 46-55 of our main brief:

The SEC now agrees that the rescission offer decreed at its instance may have fully remedied any injury done to anyone by the BAR omission (SEC Brief 149-50 n.359). Certainly that is so as to Chris-Craft, which bases its claim on a derivative presumption of injury. Therefore, no damages should be awarded.

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[22] *See generally* Note, *Chris-Craft: The Uncertain Evolution of Section 14(e)*, 76 COLUM. L. REV. 634, 655-57 (1976). Even *Ute* did not rely on *Mills* to postulate injury, but to find reliance in a situation where a factual inference of reliance by the plaintiffs was virtually inescapable and their injury was indisputable.

The Solicitor General in his statement appended to the SEC's brief calls to the Court's attention the earlier expressed view of the United States that the Court of Appeals took "an incorrect approach in measuring damages" (SEC Brief 198). The SEC agrees on the limitation of First Boston's liability, as noted above, and tacitly concedes the broader proposition (SEC Brief 161 n.370).

V. Summary

Error pervaded every aspect of the decision below. The law was improperly construed and applied on questions of culpability, causation and damages. The Court of Appeals' analysis and understanding of the character of First Boston's conduct as to the Bangor Punta registration statement were particularly askew, both factually and legally.

The basic inapplicability to this type of litigation of rules developed by the courts to protect defrauded or misled investors is itself grounds for denying the judicial implication of a cause of action for damages here. When litigation is focused on theoretical deceit, unconnected to any loss by the allegedly deceived, a predictable result is confusion and arbitrary decision. Such litigation puts honest businessmen in peril of their property and reputations, encourages certain businessmen to view the judicial process as a new area of diversification, and materially interferes with the functioning of capital markets. Congress never intended to foster litigation of this nature, and it is devoid of social utility.

A full examination of all aspects of this case confirms that § 14(e) should not be construed to afford a cause of action for damages to contestants for control, and certainly not a cause of action against an underwriter of a rival exchange offer.

Conclusion

For the reasons stated herein and in our main brief, the judgment should be reversed and the complaint dismissed.

Respectfully submitted,

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September 16, 1976